

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

DECISION AND ORDER

09-CR-6071L

v.

WENDELL CAMPBELL,

Defendant.

Defendant, Wendell Campbell (“Campbell”), is charged with several other defendants with narcotics offenses. I referred all pretrial matters and motions to United States Magistrate Judge Marian W. Payson pursuant to 28 U.S.C. § 636(b). Campbell filed several motions, including a motion to suppress photographic identification (Dkt. #204). Magistrate Judge Payson conducted a hearing on the motions, allowed supplemental memoranda to be filed and on December 3, 2010, issued a written Report and Recommendation (Dkt. #438) which referenced an oral Report and Recommendation that she announced in court on that same day, December 3, 2010. Campbell duly filed objections to that Report (Dkt. #441) and, therefore, the matter is before this Court for review.

I have reviewed the written Report and Recommendation (Dkt. #438), and I have listened to the entire proceeding conducted in court on December 3, 2010, when Magistrate Judge Payson orally announced her Report and Recommendation. That proceeding, as are most proceedings before the Magistrate Judges, was tape recorded, and I have listened to that recording. The recordings of the suppression hearings have also been available for my review.

After review, I see no reason to modify, alter or reject the Magistrate Judge's determination that the identification procedures were not unduly suggestive and, therefore, I adopt her recommendation that defendant's motion to suppress photographic identification should be denied.

There were apparently several identification procedures and the same six-person array was shown to the several witnesses. Identifications were made by cooperating witnesses on the several dates listed in the Magistrate Judge's written Report and Recommendation. Magistrate Judge Payson found that none of the procedures were unduly suggestive. Magistrate Judge Payson having found no undue suggestivity did not need to determine the second part of the analysis, that is, whether even had there been suggestivity, there was an independent basis for the identification.

Magistrate Judge Payson further recommended that there be a supplemental hearing conducted with respect to the identification made on April 26, 2010. Magistrate Judge Payson directed that a further proceeding be held relative to the identification on that date to take testimony from the cooperating witness who made the identification. It is suggested that this take place at a time relatively close to trial so that the identity of these witnesses can be protected, at least up until the time of trial.


In conclusion, I find, as did Magistrate Judge Payson, that there was no suggestivity employed by the agents. The array was fair and did not highlight Campbell's appearance and, therefore, the procedures were not in any way suggestive.

CONCLUSION

I accept and adopt the Report and Recommendation (Dkt. #438) of United States Magistrate Judge Marian W. Payson. I deny defendant's motion to suppress photographic identification (Dkt. #204), and I direct that the Magistrate Judge conduct a further proceeding with the witness who made

the identification on April 26, 2010 at a time reasonably close to the trial of this case which is now scheduled for July 6, 2011.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
February 17, 2011.